Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RAYTHEON AEROSPACE, INC. AND WAYNE LEESE,
Petitioners,

v.

KIMBERLY ANN GREENWELL,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Fifth Circuit clearly violate this Court's mandate in *Harris v. Forklift Systems* and concomitantly create a conflict among the Circuits when it found that two acts of alleged verbal harassment committed over a four-month period satisfy the objectively severe and pervasive harassment element necessary for a hostile environment claim?

II. Did the Fifth Circuit create a conflict among the Circuits and impose an unreasonable burden on employers when it found that an employer responds inadequately to an employee's complaint of sex-based verbal harassment despite the fact that the employer:

   A. Investigated the complaint approximately one week after it was lodged;

   B. Confronted the alleged harasser;

   C. Obtained the alleged harasser's commitment to end the allegedly offensive conduct complained of; and

   D. Took action which ultimately ended the harassment complained of by the employee?

III. Did the Fifth Circuit create an internal conflict, as well as a conflict between itself and the other Circuits, when it found that an employee can prove the existence of a causal connection between her protected activity and her employer's adverse personnel action without rebutting her employer's uncontroverted proof that it had taken the same, if not more severe, disciplinary action against other employees who have not engaged in any protected activity?

CORPORATE DISCLOSURE STATEMENT

One of the Petitioners, Raytheon Aerospace Company, has a parent corporation, Raytheon Aircraft Company, which is located in Wichita, Kansas. Raytheon Aircraft Company is owned by Raytheon Company which is located in Lexington, Massachusetts. Raytheon Aerospace Company has no subsidiaries, except wholly owned subsidiaries, which need not be identified pursuant to Supreme Court Rule 14.1(b).

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PETITION FOR WRIT OF CERTIORARI

Raytheon Aerospace, Inc. and Wayne Leese respectfully petition this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 97-30002 (United States Court of Appeals for the Fifth Circuit, December 22, 1997).

OPINIONS BELOW

On December 2, 1997, the United States Court of Appeals for the Fifth Circuit issued its opinion (Pet. App. at 1a-2a) affirming in part, and vacating in part, the district court's December 9, 1996 Order denying Petitioners' Motion for Judgment as a Matter of Law (Pet. App. 3a-11a).

JURISDICTION

The opinion, which constitutes its judgment, of the United States Court of Appeals for the Fifth Circuit, was

entered on December 22, 1997. The Certiorari jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), which relates to the Plaintiff's, Greenwell's, federal law hostile environment claim against Raytheon is set forth below:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The statute pertaining to Greenwell's Title VII retaliation claim against Raytheon is 42 U.S.C. § 2000e-3(a). The pertinent provision of that statute is set forth below:

> § 2000e-3(a) Other Unlawful employment practices
>
> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicants for membership, because he has opposed

> any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

The pertinent provision of the Louisiana Code which relates to Greenwell's state law hostile environment claim against Raytheon is Louisiana Revised Statute § 23:1006 (B)(1). The relevant portion of that statute is set forth below:

> § 1006. Intentional discrimination in employment
>
> B. It shall be unlawful discrimination in employment for an employer to:
>
> > (1) Intentionally fail or refuse to hire, refer, discharge, or to otherwise intentionally discriminate against or in favor of an individual with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin.

The pertinent provision of the Louisiana Code which relates to Greenwell's state law retaliation claims against Raytheon and Leese is Louisiana Revised Statute § 51:2256(1). The relevant portion of that statute is set forth below:

> § 2256. Conspiracy to violate this Chapter unlawful
>
> It shall be an unlawful practice for a person or for two or more persons to conspire:
>
> > (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this Chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.

CONCISE STATEMENT OF THE CASE

A. Facts

Greenwell began her employment with Raytheon in November 1990 as a mechanic at Raytheon's Moffet Field facility in California. The company later transferred her to its Fort Ord facility where she remained until her promotion as leadperson at Raytheon's New Orleans, Louisiana facility located at the Lakefront Airport ("Lakefront"). As leadperson, Greenwell was responsible for servicing one aircraft, a "C-12," which was owned by Raytheon's only customer at Lakefront, the Louisiana Army National Guard (the "Guard"). After completion of training school in August 1992, Greenwell assumed her duties at Lakefront.[1]

Since the Guard had never hired an outside contractor to service its aircraft at Lakefront, there was an expected adjustment period between the Guard and Raytheon. This adjustment period began without incident, but soon changed when Greenwell demanded additional office space and a reserved parking spot even though Raytheon's contract with the Guard did not obligate it to furnish such amenities. Shortly thereafter, Greenwell learned that a Guard employee, Michael Boudreaux, had referred to her as the "BASI-bitch" outside of her presence.[2] About this time, two other Guard employees, Major Tom Mix and COR[3] Norris Babin, allegedly referred to Greenwell as "little girl" and/or "BASI-gal."

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[1] Greenwell also supervised Jim Stout, a mechanic who arrived at Lakefront in November 1992. Stout was Raytheon's only other employee at Lakefront.

[2] The "BASI" portion of the "BASI-bitch" term refers to Raytheon's former name, Beech Aerospace Services, Inc. Boudreaux allegedly made this statement in September 1992.

[3] "COR" refers to Contracting Officer Representative.

Greenwell reported the above-referenced comments to her supervisor, Walt House. On September 29, 1992, House met with Colonel Nuss, the highest ranking Guard officer at Lakefront, and obtained Nuss' assurance that such conduct would not be tolerated. Greenwell was admittedly satisfied with House's action and his meeting with Nuss. However, the tension between Greenwell and the Guard grew over the next few months as the Guard employees became more dissatisfied with Greenwell's technical competence and her uncooperative attitude. The Guard employees observed no less than ten separate mechanical problems during her tenure at Lakefront.[4] Despite these problems, the Guard did not initially complain to Raytheon because they wanted to afford Greenwell an opportunity to learn how to service the aircraft.[5] Nonetheless, by April 1994, the Guard's patience had worn thin as evidenced by a disagreement between Greenwell and COR Babin over the removal of tape from the Guard's hangar floor.

This April 1994 dispute began when Babin used tape to mark a spot where the plane should rest while it was temporarily stored at a different location in the hangar. The Guard informed Greenwell that the tape had to be removed in one week. However, Greenwell did not remove the tape after the week expired which prompted Babin to tell Greenwell to "get the damn tape off the floor." Greenwell removed the tape, but she charged the Guard with two hours of "non-reporting time" on her monthly status report for the time spent removing tape.[6]

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[4] Those problems included: (1) fuel leakage through the plane's wing panels; (2) detachment of the forward cowlings during flight; and (3) malfunctions in the navigation system, engine, landing gear, and brakes.

[5] Guard pilots Babin and Keeling frequently took Greenwell on flights so she could gain more insight into the C-12's various mechanical problems.

[6] By including this time as "non-reporting time", Greenwell prevented such time from reducing her "operational readiness" or "OR" rate, one of the criteria by which she was evaluated.

Babin then informed "ATCOM"[7] that Greenwell charged the Guard with "non-reporting time," and ATCOM called Raytheon to complain about this incident. After Greenwell's new supervisor, Wayne Leese, learned about this incident, he told Greenwell she should not have charged the Guard with "non-reporting time." Greenwell responded by informing Leese that Babin had used a loud tone of voice when he requested her to remove the tape, and Greenwell told Leese she considered this sexual harassment. Before this incident, Greenwell had never complained to Leese about Babin's, or the Guard's, alleged sexual harassment.

Approximately one week later, Leese traveled to Lakefront to investigate Greenwell's sexual harassment complaint.[8] Leese interviewed several Guard employees, including Babin and Michael Boudreaux. Leese also confronted Colonel Nuss with Greenwell's complaints. Nuss and Babin then advised the Guard employees that any inappropriate conduct or language would not be tolerated.

After Leese concluded his investigation, he drafted a report regarding Greenwell's complaints and his response thereto. Leese's report stated that Greenwell no longer considered Babin's statement about the tape to be sexual harassment, but she still considered the "BASI-bitch" comment to be sexual harassment, even though it occurred 18 months earlier. (Pet. App. at 16a). Greenwell read Leese's report, signed it, and never recanted her ratification of that report until after filing her lawsuit.

Approximately two months later, Guard pilot Barry Keeling and an instructor pilot, John Fowler, took the C-12 out for a routine flight. They were about 6,000 feet

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[7] ATCOM is the acronym for Army Aviation Troop Command, the agency responsible for supplying and maintaining the Army's equipment.

[8] Leese was temporarily delayed because he had to attend an important meeting with the Navy in Pensacola, Florida.

up when they smelled smoke in the cockpit. Keeling turned around but could barely see because the cockpit was filled with smoke. Keeling contacted a nearby Austin, Texas control tower and obtained clearance for an emergency landing which he safely performed.

After Keeling landed the plane, he requested that a mechanic from Raytheon's nearby facility inspect the plane's blower and air conditioning system because the air conditioner had not worked for over a month. Raytheon's mechanic found serious problems in the air conditioning system.[9] Since Greenwell's subordinate, Stout, was on vacation the entire week before this emergency landing, Greenwell was the only person who could have worked on the air conditioner before Keeling's July 12, 1994 departure.[10]

After Raytheon's Austin, Texas mechanic informed Babin of these critical mechanical problems, Babin called Raytheon's headquarters and reported the serious deficiencies.[11] Raytheon informed Babin that the Guard must put their complaints in writing before Raytheon would review them. Shortly thereafter, COR Babin, Major Keeling, Colonel Nuss, Major Mix and former Assistant COR Boudreaux, forwarded written complaints to Raytheon regarding Greenwell's deficient performance. (Pet. App. at 17a-26a).

After Raytheon's Human Resource Director, Bill Ogle, reviewed the Guard's letters with the Operations Department, Raytheon decided to transfer Greenwell from Lakefront because Raytheon's practice had always been to

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[9] These problems included cross-threaded tubing, an improperly placed coil, deformed fittings and "Pro-seal" on the fittings.

[10] Greenwell admitted her error in placing Pro-seal on the fittings.

[11] Although Babin had not complained about Greenwell's mechanical skills before, he now realized that something had to be done to ensure the Guard's pilots' safety.

remove an employee following a customer's complaint.[12] Thus, on July 28, 1994, Raytheon transferred Greenwell to a mechanic's position at its Belle Chasse, Louisiana facility.[13]

Greenwell thereafter obtained the Guard's complaint letters and responded with a rebuttal letter in which she claimed that the Guard's complaints were either untrue or exaggerated. Bill Ogle recommended that she provide Raytheon's Operations Department with a copy of her rebuttal letter because Ogle had limited knowledge regarding the mechanical issues discussed therein. Inexplicably, Greenwell rejected Ogle's offer and would not allow him to forward her rebuttal letter to Raytheon's Operations Department.

In August 1994, Wayne Leese gave Greenwell a "below average" rating in quality and accuracy of work based on the C-12's air conditioning problems, the Guard's complaints and 94-96 "discrepancies" found during Leese's May 1994 inspection.[14] Leese gave Greenwell satisfactory ratings in all other categories. Greenwell nonetheless disputed Leese's evaluation even though she suffered no loss of pay or benefits following it.

On October 5, 1994, Lance Fachman, Greenwell's supervisor at Belle Chasse, discovered that she and a coworker, Dave Burlette, overtorqued 75-100 "C-flange" bolts on an aircraft. Overtorquing these bolts was a potentially serious error because it could cause the engine to break apart while the plane was in the air. Shortly after October 5, 1994, Fashman mentioned this incident to his

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[12] Raytheon's removal practice had been adopted because it was ultimately responsible if any of its customers' employees were injured due to a mechanical defect in an airplane.

[13] Greenwell's transfer resulted in a $4,368.00 per year salary reduction.

[14] Greenwell had already assumed her position at Bell Chasse when Leese performed his August 1994 evaluation.

supervisor, Wayne Leese. Leese responded by telling Fachman that this infraction had to be documented pursuant to Raytheon's policy. However, Fachman did not believe documentation was necessary, and he therefore failed to follow Leese's instruction. Once Leese learned of Fachman's inaction, he again instructed Fachman to record the employees' error. Fachman thereafter complied by documenting both employees' errors.[15]

In February 1995, Raytheon's new Vice President of Operations, Dave Robinson, began investigating Greenwell's claims and the reasonableness of reinstating her as leadperson at Lakefront.[16] On February 22, 1995, Robinson contacted Greenwell to relay his initial findings. In doing so, he told Greenwell that, in general, it would be difficult for an employer to perceive a litigious employee as not "biting the hand that feeds him." Robinson then told Greenwell she had two paths to choose from: (1) she could look to resolve her claims with his help; or (2) she could litigate which would make it difficult for him to help her because "everything would have to be washed through the legal process." After Greenwell's counsel learned of Robinson's offer, she prohibited him from speaking with Greenwell again, thereby terminating Robinson's reconciliation efforts. Two months later, Greenwell resigned from Raytheon.

B. Proceedings Below

On July 3, 1995, Greenwell filed her Complaint in the Federal District Court for the Eastern District of Louisiana against Defendants Raytheon, Wayne Leese and Dave Robinson. Greenwell claimed that Raytheon violated both

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[15] Fachman's memo regarding the overtorquing incident did not affect either Burlette's or Greenwell's pay, benefits, or promotion status.

[16] Robinson was investigating this issue in response to Greenwell's attorney's demand for her reinstatement as leadperson at Lakefront.

Title VII and Louisiana Revised Statute § 23:1006 by subjecting her to a sex-based hostile work environment. Greenwell also sued Raytheon for retaliatory demotion under Title VII and Louisiana Revised Statute § 51:2256. Finally, Greenwell sued Raytheon for intentional infliction of emotional distress under Louisiana Civil Code Article 2315. Additionally, Greenwell sought punitive damages against Raytheon for her Title VII claims pursuant to 42 U.S.C. § 1981a.

At trial, Raytheon moved for directed verdict on all of the Plaintiff's claims. This district court granted Raytheon's motion on the Plaintiff's intentional infliction claim, but it denied Raytheon's motion on her federal and state law claims for sex and retaliation discrimination. The Court also denied Raytheon's motion on the Plaintiff's punitive damage claim. After trial, the jury returned a compensatory damages verdict of $100,000 against both Defendants Raytheon and Leese.[17] The jury also assessed a $500,000 punitive damage award against Raytheon pursuant to 42 U.S.C. § 1981a.

Plaintiff sued Defendant Leese for retaliation under Louisiana Revised Statute § 51:2256 and for intentional infliction of emotional distress under Louisiana Civil Code Article 2315. At trial, Leese moved for directed verdict on both of these claims, and the district court granted Leese's motion on the intentional infliction claim. However, the district court sent the retaliation claim to the jury, and the jury returned its verdict against Leese for $100,000.[18]

Finally, Greenwell sued Defendant Robinson under the same state statutes as Leese. The district court granted Robinson's motion for summary judgment on the inten-

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[17] As discussed below, the jury found Leese jointly liable for these damages.

[18] *See* n.17, *supra.*

tional infliction claim, and the court later granted Robinson's motion for directed verdict on the retaliation claim.

The district court thereafter entered judgment in accordance with the jury's verdict, but it also added a backpay award of $7,520 against Defendants Raytheon and Leese. (Pet. App. at 12a-13a). Defendants thereafter jointly moved for judgment as a matter of law contending that there was insufficient evidence to support the jury's verdict.[19] Additionally, Raytheon moved for directed verdict because it contended that the district court erroneously admitted testimony regarding Robinson's February 22, 1995 statements with Greenwell pursuant to Fed. R. Evid. 408, and that this admission substantially prejudiced its rights. The district court denied all of the Defendants' post-trial motions except for partially granting Raytheon's request for a remittitur of the punitive damage award as the court reduced that award from $500,000 to $300,000 based on its reconciliation of the jury's verdict and the damages cap in 42 U.S.C. § 1981a. (Pet. App. at 14a-15a).

In its December 22, 1997 opinion, the Fifth Circuit affirmed the district court's rulings and entered an order denying Defendants' motion for judgment as a matter of law except in one respect. The Fifth Circuit reversed the lower court's finding that sufficient evidence existed for a punitive damage award under 42 U.S.C. § 1981a.

Petitioners now seek review of this Court.

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[19] Alternatively, Defendants requested a new trial pursuant to Fed. R. Civ. P. 59. However, the Court also denied this request.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RECTIFY THE FIFTH CIRCUIT'S COMPLETE DEPARTURE FROM THIS COURT'S DIRECTIVE IN *HARRIS v. FORKLIFT SYSTEMS* AND TO PREVENT A CONFLICT AMONG THE CIRCUITS REGARDING THE CONDUCT NECESSARY TO PROVE THE EXISTENCE OF AN OBJECTIVELY HOSTILE WORK ENVIRONMENT.

In affirming the district court, the Fifth Circuit completely departed from this Court's directive in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 370 (1993), the Fifth Circuit's own precedent in *DeAngelis v. El Paso Mun. Police Officers' Assn.*, 51 F.3d 591, 593 (5th Cir. 1995), *cert. denied* —— U.S. ——, 116 S.Ct. 473, and at least three other Circuit Courts of Appeal. *See Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 772-73 (4th Cir. 1997); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995). The Fifth Circuit departed from *Harris*, and the other Circuits identified *supra*, when it found that two instances of minor verbal harassment over a four-month period was sufficiently severe and pervasive conduct "to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive. . ." *Harris, supra* at 21.

In this case, the Plaintiff presented but two acts of non-time barred harassment in support of the "objectively severe and pervasive conduct" element of her hostile environment claim: [20] (1) COR Norris Babin told her "to

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[20] The plaintiff testified about the "BASI-bitch" comment and other instances of alleged verbal harassment occurring before April 1, 1994. However, the district court correctly instructed the jury that any pre-April 1, 1994 conduct was not actionable and could only be used to determine whether the post-April 1, 1994 conduct complained about was motivated by Greenwell's sex or her complaints about alleged sexual harassment. The district court in-

get the damn tape off the floor" in late April 1994; and (2) Greenwell's subordinate, Jim Stout, stated that he wished Plaintiff were Kim Basinger instead of Kim Greenwell during the summer of 1994.[21] Clearly, these two instances of alleged verbal harassment cannot possibly satisfy the objectively severe and pervasive harassment standard promulgated by this Court in *Harris* and applied by the Circuits. *See Southard v. Texas Bd. of Criminal Justice*, 124 F.3d 539, 555 (5th Cir. 1997) (finding that a few instances of verbal harassment and requests for performance of menial tasks did not satisfy objectively severe and pervasive harassment standard); *Hartsell, supra* at 772-73 (co-workers' immature, insensitive and insulting comments were insufficient to create objectively hostile work environment); *Black, supra* at 826 (reversing jury verdict in favor of employee on hostile environment claim because male co-workers' comments were offensive, inappropriate and unprofessional, but insufficiently severe or pervasive to prove hostile environment claim); *Baskerville, supra* at 430-31 (reversing jury verdict because several instances of verbal harassment over a seven-month period were insufficiently severe or pervasive to create objectively hostile work environment).

On appeal, the Plaintiff recognized the complete paucity of evidence supporting the objectively abusive conduct element of her hostile environment claim because she offered a previously unasserted theory in support thereof. Greenwell claimed that the Guard's July 1994 complaint letters regarding her deficient mechanical skills and uncooperative behavior were sufficient, by themselves, to have created an objectively hostile work environment.

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structed the jury in this manner because the pre-April 1, 1994 conduct was outside the applicable statutes of limitation. Since the Plaintiff never objected to this instruction, she waived any alleged error in it pursuant to Fed.R.Civ.P. 51.

[21] Although Greenwell testified about Stout's comment, she never contended that this statement constituted actionable sex-based harassment.

However, the Plaintiff overlooked one very critical fact: these letters could not have created an objectively hostile work environment at *Lakefront* because the Guard's letters were not communicated or provided to Greenwell until *after* Raytheon transferred her from Lakefront. This critical distinction also prevented Greenwell from proving that she subjectively perceived these letters as creating a hostile work environment, another requirement for establishing her claim. *Harris, supra*, at 21-22. Accordingly, this novel theory did not, and cannot, cure the otherwise deficient proof offered to show that Raytheon subjected Greenwell to an objectively hostile work environment.[22]

Finally, this case, more than any other this Court will see, cries out for refinement of the "objectively hostile or abusive work environment" standard articulated in *Harris*.[23] Justice Scalia was most prophetic when he candidly addressed the problems created for employers and the lower courts by *Harris*' definition of hostile work environment:

> [a]busive (or hostile, which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "[reasonable person['s]" notion of what the vague word means. . . . As a practical

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[22] The same analysis above would also be applicable to Greenwell's state law hostile environment claim as the Fifth Circuit has correctly found that Louisiana's anti-discrimination statutes are interpreted like their federal counterpart, Title VII, because of their similarity in scope and purpose. *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1274 (5th Cir. 1989); *Williams v. Conoco, Inc.*, 860 F.2d 1306-07 (5th Cir. 1988).

[23] This Court recently reaffirmed its commitment to the "objectively hostile or abusive work environment" standard when it found this element to be "crucial" in preventing both judges and juries from converting otherwise isolated, innocuous comments into discriminatory "conditions of employment." *Oncale v. Sundowner Offshore Services, Inc.*, —— U.S. ——, —— S.Ct. ——, 1998 WL 88039 at p. 4 (U.S. La.) (March 4, 1998).

> matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.

Harris, supra at 24 (Scalia, J., concurring). *See also Ellerth v. Burlington Ind.*, 123 F.3d 490, 501 (7th Cir. 1997) (*en banc*) *cert. granted in part*, 118 S.Ct. 876 (January 23, 1998) (lamenting the difficulty which both employers and courts have had, and will continue to have, in determining conduct necessary to create a hostile work environment). Justice Scalia's concern over this issue was, and never will be more, fully realized than in the instant case.[24] Further, this court, the lower courts, and the nation have, willingly or not, been forced to confront the issue of what constitutes actionable sexual harassment. (Pet. App. 27a-49a).[25] Accordingly, the instant case presents this court with a perfect opportunity to not only prevent a split in the circuits, but to articulate a definition of actionable sexual harassment which will prevent the further "opening of more expansive vistas of litigation" as Justice Scalia astutely predicted some five years ago. *See Harris, supra* at 24.

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[24] This Court also recently explained that "common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing . . . and conduct which a reasonable person in the plaintiff's position would find *severely* hostile or abusive." *Oncale, supra* at p. 4 Petitioners agree that such common sense *should* prevail, but as demonstrated herein, both the jury and lower courts omitted it from their determinations.

[25] As reflected by recent articles attached hereto, neither lay people nor legal scholars truly understand what is legally proscribed sexual harassment. This problem is compounded by the fact that the EEOC reports that the number of sexual harassment complaints has doubled since 1991. (Pet. App. at 30a). Further, a June, 1997 *CNN/USA Today Weekend* poll found that 15% of all adults are either "afraid" or very afraid" or being accused of sexual harassment. Such fear undoubtedly stems from the fact that most of those polled do not comprehend (and/or fear others do not comprehend) the definition of actionable sexual harassment.

II. PETITION FOR CERTIORARI SHOULD BE GRANTED SO THAT EMPLOYERS WITHIN THE FIFTH CIRCUIT ARE NOT SUBJECT TO STRICT LIABILITY FOR COWORKER HARASSMENT, A STANDARD WHICH CLEARLY CONFLICTS WITH THIS COURT'S MANDATE IN *MERITOR SAVINGS BANK F.S.B. v. VINSON* AND THE OTHER CIRCUITS.

By affirming the district court, the Fifth Circuit essentially found that once an employee is allegedly harassed by a coworker, or as in this case, a customer, her employer is strictly liable for that harassment, irrespective of the employer's response thereto.[26] That inescapable conclusion is established by the following facts:

1. Greenwell complained to Wayne Lease in late April 1994 about Norris Babin's loud request for her to remove tape from the hangar floor;[27]
2. Leese investigated her complaints in early May 1994;[28]
3. Leese confronted the alleged harasser, the Guard;
4. Leese obtained the Guard's commitment to end the allegedly offensive conduct complained of; and

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[26] This Court has already granted certiorari on two cases to resolve the standard by which an employer incurs liability for a supervisory employee's creation of a sexually hostile work environment. *See Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (*en banc*) (*cert. granted*, 118 S. Ct. 438) and *Ellerth*, *supra*.

[27] On appeal, Greenwell claimed that Raytheon was also liable for her former supervisor's, Walt House's, alleged failure to remedy the Guard's pre-April 1, 1994 conduct, i.e., the "BASI-bitch," "little girl" comments. However, the district court properly instructed the jury that Leese's alleged inaction, like the other pre-April 1, 1994 conduct, was not actionable because it was outside the applicable statute of limitations.

[28] Greenwell was admittedly satisfied with the promptness of Leese's response.

5. Leese's action ended the alleged harassment complained of by Greenwell.[29]

Although this Court has never directly addressed the adequacy of an employer's response to a sexual harassment complaint, the Fifth Circuit, like the other Circuits, has. Prior to this case, the Fifth Circuit has held that an employer must take action reasonably calculated to end harassment of which it should have known. *Nash v. Electrospace, Inc.*, 9 F.3d 401, 403-04 (5th Cir. 1993). Clearly, the panel in the instant case completely deviated from its own precedent in finding that Leese's action was not "reasonably calculated to end" Greenwell's complaint about the Guard's alleged harassment as Leese's response was not only reasonably calculated to end such harassment, but it in fact ended such harassment. Thus, the Fifth Circuit essentially imposed strict liability on Raytheon, and by doing so, it created an internal conflict and a conflict between itself and the other Circuits. *See Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 873 (6th Cir. 1997) (employer is only liable for reckless indifference to employee's harassment complaint as negligent, good faith, response insulates employer from liability); *Perry v. Ethan Allen*, 115 F.3d 143, 149 (2nd Cir. 1997) (employer is only liable if it provides no reasonable avenue of complaint or does nothing about known harassment; *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 171 (10th Cir. 1996) (employer incurs liability for recklessly or negligently failing to remedy harassment of which it knew, or should have known). Moreover, the Fifth Circuit's ruling in this case violated this Court's mandate that employers are not "automatically liable" for

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[29] After Leese's investigation and meeting with the Guard was complete, the Guard did not subject Greenwell to any other acts of alleged verbal harassment. However, Jim Stout, Greenwell's subordinate, stated that he wished she were Kim Basinger instead of Kim Greenwell, but Greenwell rightfully never contended that Stout's statement was actionable sex-based harassment.

sexual harassment. *Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 2408 (1986).

On appeal, Greenwell recognized the deficiency of proof offered to show that Raytheon and/or Leese inadequately responded to her April 1994 harassment complaint as she asserted that Leese's action was deficient because he failed to prevent the Guard employees from sending their July 1994 complaint letters. Greenwell's argument is completely meritless unless one accepts the two illogical precepts underlying it: (1) Raytheon somehow should have stopped the Guard from complaining about her deficient maintenance of the C-12, a deficiency which nearly caused the death of two Guard pilots; and (2) Raytheon should have anticipated such action from the Guard and preempted it even though neither Greenwell, nor the Guard, had done anything to place Raytheon, or Leese, on notice that the Guard would falsely complain about her performance. Further, the law does not require an employer to possess such clairvoyancy. *Nash, supra* at 404 (finding that employer is not liable for failure to rectify harassment of which it had no reason to know). Accordingly, there was no evidentiary or legal basis for the Fifth Circuit to conclude that Raytheon took inadequate action in response to Greenwell's April 1994 complaint.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT CREATED BY THE FIFTH CIRCUIT'S HOLDING THAT AN EMPLOYEE CAN PROVE THE EXISTENCE OF A CAUSAL CONNECTION BETWEEN HER PROTECTED ACTIVITY AND HER EMPLOYER'S ADVERSE PERSONNEL ACTION WITHOUT REBUTTING HER EMPLOYER'S UNCONTROVERTED EVIDENCE THAT IT HAS TAKEN THE SAME, IF NOT MORE SEVERE, DISCIPLINARY ACTION AGAINST OTHER EMPLOYEES WHO HAVE NOT ENGAGED IN ANY PROTECTED ACTIVITY.

Greenwell asserted that Raytheon was liable for unlawful retaliation under state and federal law because it

transferred and demoted her following Greenwell's April 1994 complaints regarding the Guard's alleged verbal harassment. However, Raytheon provided uncontroverted proof that it had taken the same, if not more severe, disciplinary action against other employees about whom its customers had complained.[30] As for defendant Leese, Greenwell claimed that he had given her a worse performance evaluation than she deserved in August 1994, and that he recommended the documentation of an admitted mechanical error in October 1994 in retaliation for her complaints about the Guard's alleged harassment.[31] As with Raytheon, Leese also provided uncontroverted proof that he took the same action against two of Greenwell's former coworkers, Jim Stout and Dave Burlette, as he took against her.[32]

To establish her retaliation claims against both Raytheon and Leese, Greenwell had to prove:

1. that she engaged in protected activity;
2. that an adverse employment action occurred; and
3. that a causal link existed between her protected activity and the adverse employment action.

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[30] The uncontroverted proof was that Raytheon had not only transferred and demoted employees about whom customers had complained, but that it had also terminated employees about whom customers had complained.

[31] The October 1994 admitted mechanical error was Greenwell's overtorquing of the C-flange bolts on an aircraft located at the Belle Chasse facility. Neither of Leese's allegedly adverse employment actions caused a reduction in Greenwell's pay or benefits.

[32] Leese gave Jim Stout, Greenwell's subordinate at Lakefront, the identical personnel evaluation he had given Greenwell for 1994. Likewise, Leese recommended that Lance Fachman document not only Greenwell's overtorquing of the C-flange bolts but also Burlette's overtorquing of the C-flange bolts.

Long v. Eastfield College, 88 F.3d 300, 304 (5th Cir. 1996).[33] Both Raytheon and Leese argued that Greenwell had not met her burden of proving the causal connection element of her claim because she had wholly failed to rebut the defendants' proof that they had taken the same disciplinary action against other employees who had not engaged in any protected activity. The Fifth Circuit had previously agreed with the Petitioners' defense on two occasions when it found an employee cannot prove the necessary causal connection when uncontroverted evidence showed that the employer had taken the same action against other employees who had not engaged in any protected conduct. *Anderson v. Douglas & Lomanson Co.*, 26 F.3d 1277, 1300-1302 (5th Cir. 1994); *Armstrong v. City of Dallas*, 997 F.2d 62, 66-67 (5th Cir. 1993).

In adopting the aforementioned rule in *Anderson* and *Armstrong*, the Fifth Circuit fell in line with the other Circuits which have addressed this issue. *See Penny v. United Parcel Service*, 128 F.3d 408, 417 (6th Cir. 1997) (finding that plaintiff's failure to show evidence of disparate treatment once employer offered evidence of similar disciplinary action precluded plaintiff from proving causal connection); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 693 (8th Cir. 1997) (plaintiff's failure to show disparate treatment of similarly situated non-complaining employees was fatal to proving causal connection); *Henry v. Guest Services, Inc.*, 902 F. Supp. 245, 252 (D.D.C. 1995), *aff'd.*, 98 F.3d 646 (D.C. Cir. 1996) (same); *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 484 (7th Cir. 1996) (same). Likewise, numerous district courts have also concluded that an employee will not meet his burden of proving the necessary causal

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[33] As with Greenwell's state law hostile environment claims against Raytheon, Greenwell's state law retaliation claims have been evaluated similarly to her federal retaliation claims because of the similarity in scope and purposes of Louisiana's anti-discrimination statutes and Title VII. See n.22 *supra*.

connection for a retaliation claim when his employer provides unrebutted evidence that it has taken the same disciplinary action against similarly situated non-complaining employees. *Cooper v. Housing Auth.*, 67 FEP Cas. 617, 619 (N.D. Ala. 1995); *Lawson v. Getty Terminals Corp.*, 866 F. Supp. 793, 803-04 (S.D.N.Y. 1994); *Lees v. Case-Hoyt Corp.*, 779 F. Supp. 717, 727 (W.D.N.Y. 1991).[34]

Ignoring its own precedent, as well as that of the other Circuits and lower federal courts, the Fifth Circuit created a conflict herein when it found that Greenwell met her burden of proving a causal connection even though she offered no evidence rebutting Raytheon's proof that it had taken the same, if not more severe, disciplinary action against other non-complaining employees. Accordingly, this Court should grant certiorari to remove the uncertainty and conflict created by the Fifth Circuit's decision in the instant case and to articulate the proof necessary to establish a causal connection between an employee's protected activity and his/her employer's adverse personnel action.

CONCLUSION

Undoubtedly, the Plaintiff will respond to this Petition by arguing that this court should deny certiorari because the lower court decisions were unpublished and therefore lack any meaningful precedential value. However, this court has reviewed numerous unpublished decisions, especially those, like the instant one, which have "so far departed from the accepted and usual course of judicial proceedings, . . ., as to call for an exercise of this Court's supervisory powers." *See* S. Ct. R. 10(a). Indeed, the fact that the lower courts' decisions may escape further

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[34] Petitioners' review of this Court's precedent revealed no decision in which this Court had addressed the proof necessary to support the causal connection element for a retaliation claim.

review because of their unpublished status only enhances the need for this Court's review. Accordingly, for this reason and all other reasons set forth herein, the Petitioners respectfully request the Court to issue a writ of certiorari in this case. Alternatively, if this Court renders an intervening decision in any of the cases that are presently under review which limits the Petitioners' liability, then Petitioners request that this Court vacate the lower court's judgment and remand for proceedings consistent therewith.

Respectfully submitted,

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